(25)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 843

SAFEWAY TRAILS, INC.,
Petitioner,

vs.

AARON E. GREENLEAF.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF.

LOUIS H. SHEREFF,
Counsel for Respondent.

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No. 843

SAFEWAY TRAILS, INC.,

Petitioner,

against

AARON E. GREENLEAF.

Respondent.

RESPONDENT'S BRIEF.

Statement.

The Contract, its Making and Ratification.

The making, ratification and breach of the contract sued on, was found both by the District Court and the Circuit Court of Appeals. These are the facts:

In October, 1940, respondent owned practically all of the stock of one Eastern Trails, Inc. and the controlling stock of petitioner (R. 40, 41). Both companies were motor carriers operating between New York and Washington, and at that time there was in existence a contract for their merger which had been approved by the Interstate Commerce Commission (R. 195). Eastern was indebted to respondent on demand notes bearing 6% interest (R. 173, 174). It was insolvent, which condition continued to the

date of the trial (R. 134). Respondent sold his controlling stock in petitioner to persons who were its minority stockholders, and who then became the owners of a substantial majority of its stock. One of these (Schnebly) was then its president and director. The others immediately became the entire board of directors (Ex. 6, R. 175).

Petitioner requested respondent to give it control over Eastern for a period of two years. Respondent did turn over such control to petitioner by giving Schnebly, its president, an irrevocable proxy to vote his stock in Eastern (Ex. 5, R. 31). As consideration for turning over such control, petitioner agreed to assume Eastern's indebtedness to respondent, and execute with Eastern, a note to respondent for the amount of the indebtedness, payable at the rate of $500.00 per month, with interest at 5% per annum (R. 49, 51, 52, 54). The note was never executed.

Petitioner did exercise control over Eastern and operated it as part of its organization. It exercised the proxy and elected its own board of directors as the directors of Eastern (R. 133). It used Eastern's equipment (R. 135) and used Eastern's local franchise rights in New Jersey (R. 143). While in control of Eastern, petitioner caused Eastern to make some of the monthly payments with 5% interest, to respondent. The action was brought for breach of the agreement to execute the note.

The Alleged Condition Precedent

The written portion of the agreement sued on required petitioner to make a certified audit of the books of Eastern. Petitioner admitted in the Circuit Court that that was its obligation and not respondent's, and the Circuit Court so found (R. 237). Although petitioner claims that the audit was an express condition, there is nothing in the record to show that it was.

The books were in such condition that an audit was impossible. However, petitioner did make an investigation of respondent's account with Eastern. This was done by its president and treasurer and Eastern's treasurer. Two of these were accountants, though not certified (R. 132). Petitioner notified respondent that it had examined Eastern's books and found that the indebtedness to him was $18,395.53 as of January 15, 1941, and sent him a transcript of the account (Ex. 7, R. 177). Petitioner's counsel wrote respondent excusing the delay in making the $500.00 monthly payments, and said (Ex. 9, R. 181):

> "* * * we should be able to make the payments right on the dot. You may rest assured that we will see that they are made in accordance with the agreement."

And further (R. 182):

> "In any event, the thing that you want is to receive your money and you may rest assured that the monthly payments will be made by Eastern Trails in accordance with the agreement."

Although petitioner refused to pay respondent it never based its refusal upon the ground that a certified audit had not been made. Its refusal was based purely on the ground that it had not made the agreement.

The Circuit Court of Appeals decided that the making of the audit was not a condition precedent and even if it were, it was waived both by the statement of account and by continuing to accept the benefits of the contract (R. 237).

Claim of Alleged Non-Joinder.

Petitioner contends that its liability was a joint one with Eastern and that such joint indebtedness was the "joint interest" referred to in Rule 19a. It contends that because

its joint obligor was not joined as a party defendant, respondent could not recover. It made no attempt to bring in Eastern as a party. Respondent contended in the courts below that the indebtedness was not a joint one but joint and several, and further, that the words "joint interest" did not mean a joint obligation—but such a joint interest in a *res* that a court cannot make a determination without unjustly affecting the rights of the absent party. The majority opinion of the Circuit Court did not decide that the indebtedness was joint. It merely assumed it (R. 235). The concurring opinion held that Eastern and Safeway were not co-equal promisors and that Eastern was only a formal party (R. 239).

Point I.

The Evidence Clearly Established that the Contract Was Made, Ratified and Breached.

Both the District Court and the Circuit Court of Appeals found that the contract sued on was made, ratified by the continuing acceptance by the petitioner of its benefits, and was breached. This Court will not reverse the concurrent findings of both lower courts unless clearly shown to be erroneous. *Dun* v. *Lumbermen's Credit Assn.*, 209 U. S. 20.

Petitioner claims that a formal meeting of its board of directors was necessary to make or ratify the contract. Although as a general rule directors should act collectively at a meeting and not individually, this rule often given way to the facts of a case. Where the directors are of one mind and are also the controlling stockholders, and act together in making and approving the contract (as they did here), a formal meeting is not necessary. *Gerard* v. *Empire Square Realty Co.*, 195 N. Y. App. Div. 244.

The president of petitioner actively participated in making the contract. This case is squarely within the decision

of this Court in *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 651. The *Sun Printing* case is followed in Maryland (where petitioner is incorporated). *Eastern Rolling Mill Co.* v. *Michlovitz*, 157 Md. 51.

Corporate ratification of a contract made by parties without authority does not require a formal meeting of its board of directors. In *Western Union Battery & Supply Co.* v. *Hazelett Store Battery Co.*, 61 Fed. (2d) 220, cert. den. 228 U. S. 608, the Court said, p. 229:

> "* * * the ratification of acts done on behalf of the corporation may be made very informally, by a majority of the board of directors individually."

and further held that ratification will be implied from the acceptance and retention by the corporation of the benefits of the contract. This is also the law of Maryland. *Webb* v. *Duval*, 177 Md. 592. *Jackson* v. *County Trust Co.*, relied on by petitioner is not in point. That case dealt with the sufficiency of an affidavit, which a statute required to be made by an officer. The affidavit was made by a director and the court held it was not sufficient. The other cases cited by petitioner are clearly distinguishable upon their facts.

Petitioner contends (p. 14) that on questions of substantive law the Circuit Court of Appeals decided important questions of local law "in a way probably in conflict with applicable local decisions." Such "probable" conflict is not shown in its brief. This Court has held that where lower Federal Courts are applying local law, it will not set aside their ruling, except on a plain showing of error. *Palmer* v. *Hoffman*, 318 U. S. 109, 118.

Point II.

The Making of a Certified Public Accountant's Audit Was Not a Condition Precedent, and Besides Was Waived.

The audit was an obligation on the part of petitioner and not respondent. It was not a consideration going into the making of the contract. Its purpose was to determine the correct amount due (R. 183). The obligation had already become fixed and absolute (R. 90). The obligation to assume and pay the debt had been arrived at independently of the audit and did not depend on it. An excellent definition of condition precedent is found in *New Orleans* v. *Texas & Pac. Ry. Co.*, 171 U. S. 312, 334, and after stating the definition, this Court said:

> "The non-performance on one side must go to the entire substance of the contract and to the whole consideration, so that it may be safely inferred as to the intent and just construction of the contract that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side."

Courts are disinclined to construe stipulations as conditions precedent. Williston on Contracts, Sec. 671; *Southern Surety Company* v. *McMillen Co.* (C. C. A. 10), 58 Fed. 541, 548; Rest. Law of Contracts, Sec. 257. In *Green County* v. *Quinlan*, 211 U. S. 582, the words "upon condition" were interpreted not to be a condition precedent. See also *M. O'Neil Supply Co.* v. *Petroleum Heat & Power Co.*, 280 N. Y. 50; *Mascioni* v. *I. B. Miller, Inc.*, 261 N. Y. 1.

The action of petitioner in acknowledging the existence of the agreement and arranging payments to be made under its terms (Ex. 7, R. 177, Ex. 9, R. 181) is a practical construction of the agreement that the audit was not a condition precedent. If it were one, petitioner would not have caused these payments to be made. Such a practical con-

struction is part of the contract. *Insurance Co.* v. *Dutcher*, 95 U. S. 269; *Carthage T. P. Mills* v. *Village of Carthage*, 200 N. Y. 1.

The Circuit Court held that if the audit can be considered to be a condition precedent, it was waived both by the statement of account and by continuing to accept the benefits of the contract. This has long been the law. Williston on Contracts, Sec. 687; Rest. of Law on Contracts, Sec. 292. Since both the District Court and Circuit Court of Appeals found that the petitioner accepted the benefits of the contract, the waiver must logically follow.

Respondent further showed below that petitioner repudiated the contract—not upon the ground that a certified public accountant's audit was not made—but upon the express ground that the contract was not made (R. 182). For the first time, at the trial, petitioner claimed that its own failure to make the audit exonerated it from performance. This Court said, in *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

On this point also, petitioner has shown no reason why the writ should be granted.

Point III.

Even If Petitioner and Eastern Were Joint Obligors They Do Not Have a "Joint Interest" Within the Meaning of Rule 19a R. C. P.

In the Federal Courts parties are divided into three classes, (1) proper; (2) necessary; and (3) indispensable.

These classes are well defined in *State of Washington* v. *U. S.*, (C. C. A. 9) 87 Fed. (2d) 421, 425-428. The sole test of indispensability is whether the absent party's interest is affected by the decree. If his interest is not affected he is not indispensable.

The Circuit Court did not assume, as petitioner states, (p. 7) that it and Eastern had a "joint interest." All it assumed was that they were joint debtors. The District Court believed that joint debtors were "jointly interested" although he was not confident of this interpretation (R. 213). This Court has consistently held from early days that joint obligors are not indispensable parties. *Barney* v. *Baltimore,* 6 Wall. 280, 287; *Camp* v. *Gress,* 250 U. S. 308. Such has been the unanimous holding of the lower federal courts in every circuit where this problem arose. See the following: *Samuel Goldwyn, Inc.* v. *United Artists Corporation,* (C. C. A. 3) 113 Fed. (2d) 703; *Anglo California National Bank* v. *Lazard,* (C. C. A. 9) 106 Fed. (2d) 693, 699; *McAlister* v. *Fidelity and Deposit Company of Maryland,* 37 Fed. Supp. 956; *Ostrander* v. *Blandin,* 211 Fed. 733; *Wyoga Gas & Oil Corp.* v. *Schrack,* 27 Fed. Supp. 35, id. 29 Fed. Supp. 582; *Atlas Beverage Co.* v. *Minneapolis Brew. Co.,* (C. C. A. 8), 113 Fed. (2d) 672, 675; *Gandia* v. *Porto Rico Fertilizer Co.* (C. C. A. 1), 291 Fed. 18 Cert. den. 263 U. S. 711; *Buss* v. *Prudential Insurance Co.,* (C. C. A. 8), 126 Fed. (2d) 960; *Texas* v. *Wall,* (C. C. A. 7), 107 Fed. (2d) 45; *McRanie* v. *Palmer,* 2 F. R. D. 479; *Stuff* v. *La Budde Feed & Grain Co.,* 43 Fed. Supp. 493, 495; *Spanner* v. *Brandt,* 1 F. R. D. 555; *Ford* v. *Adkins,* 39 Fed. Supp. 472; Moore's Federal Practice, Vol. 2, p. 2142.

The action was commenced in the State Court where the rule is the same. Section 192, New York Civil Practice Act. *Pickhardt* v. *First National Bank,* 206 App. Div. 781.

Petitioner makes much ado about the fact that the Circuit Court reversed the District Court on an alleged finding of fact that the parties were jointly interested. This is misleading. There was no such finding of fact. As a conclusion of law, the District Court decided that a joint debt was a "joint interest" and that the failure to join one of two joint debtors ousted the court of jurisdiction (R. 219). Petitioner's present claim that the Circuit Court in reversing the District Court on a question of law such as this has "departed from the accepted and usual course of judicial proceedings" is absurd.

Petitioner has not cited one case indicating that joint obligors have such a joint interest that either is an indispensable party to an action against the other. The weight of authority is to the contrary. On this point petitioner has also failed to show any ground why the writ should be granted.

POINT IV.

The Appeal Is Frivolous and Is Made Solely to Delay Respondent's Recovery.

The result of the decision of the Circuit Court is to award a judgment in favor of respondent for a substantial sum of money. By filing this application for the writ, petitioner has successfully delayed proceedings on the judgment, which delay will continue for some time. Petitioner has not shown any ground for an application for writ of certiorari. He has not shown any conflict between the decision below and the decision of any other Circuit Court. To the contrary the decision below follows the weight of authority. Petitioner has not shown any conflict between the decision below and the local state courts, whether it be New York or Maryland. To the contrary the decision follows the authority in both of these states. Petitioner has

not shown that this decision is in conflict with applicable decisions of this court. To the contrary it conforms with the previous decisions of this court. Petitioner has not shown that the Circuit Court has departed from the accepted and usual course of judicial proceedings. Petitioner has failed to cite one case which will sustain its point of view on any of the grounds upon which the petition is made. Beyond its bare conclusory statements, the petition and the record do not show any reason why this writ should be granted.

Since this application has delayed proceedings on the judgment of the lower court, and it is quite obvious that it has been sued out merely for delay, respondent prays that damages be awarded against petitioner for 10% of the judgment in accordance with Rule 30, subdivision 2 of the rules of this Court.

Respectfully submitted,

Louis H. Shereff,
18 East 41st Street,
New York City;
Attorney for Respondent.

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